Privy Council Appeal No. 23 of 1987

(1) Lance Murray
(2) Godfrey Jardine
(3) Harold Petit
(4) Leslie Akum Lum and
(5) Arthur Chin Lee — *Appellants*

v.

Caroni Limited — *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH MARCH 1989

Present at the hearing:-

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD LOWRY

[Delivered by ***Lord Oliver of Aylmerton****]*

This is an appeal from a judgment of the Court of Appeal of Trinidad and Tobago (Warner, Narine and Persaud JJ.A.) on 26th November 1986 dismissing with costs the appellants' appeal from the dismissal by Bernard J. on 14th October 1980 of their claim for specific performance of what they claimed was a contract for the sale to them by the respondents of certain land at Couva in the Island of Trinidad.

The appellants in 1971 became interested in a project of carrying out some residential development on a site of some 36 acres at Couva which were owned by the respondents. The only one of the appellants who in fact had any contact with the respondents was the first named appellant (to whom it will be convenient to refer as "Murray") who carried on business in partnership with the other appellants as land surveyors in Port of Spain under the style Murray and Partners. On 7th July 1971 he wrote to the respondents' general manager a letter in (so far as material) the following terms:-

> "In pursuance of our discussion on the above subject, I hereby confirm, on behalf of a group of local investors, my offer to purchase 36 acres immediately north of the Wimpey Office for the purpose of developing the area and constructing houses for sale in the range of $12,000 - $17,000.
>
> My group proposes to develop the area in three phases (12 acres each) and would like to purchase 12 acres in the first instance with an option to purchase a further 12 acres within a year and another 12 acres within another 12 months. ...
>
> We offer what we consider to be a fair and reasonable price of $7,000 per acre for the lands."

That was replied to on 12th August 1971 by the respondents in a letter signed on their behalf by Mr. Bideshi, their commercial manager, and addressed to Murray and Partners, marked for the attention of Murray, in which Mr. Bideshi said:-

> " Purchase of 36 Acres for Housing Development
>
> Anent your letter dated 7th July, 1971 on the above subject I am directed to inform you that your offer to purchase 36 acres immediately north of the Wimpey Office for the purpose of developing the area for the construction of houses has been favourably considered by our Board of Directors.
>
> We now have pleasure in offering you 12 acres at $9,000 per acre and the remaining 24 acres also at $9,000 per acre subject to 8 per cent per annum pending cash settlement."

That letter in turn was replied to by Murray on 26th November 1971 in the following terms:-

> "I am now in a position to reply to your letter of the 12th August 1971, in the above subject and to pursue your offer of twelve (12) acres at $9,000.00 per acre and the remaining twenty-four (24) acres also at $9,000.00 per acre subject to eight per cent per annum pending cash settlement.
>
> Please let me know when it would be convenient to see you to arrange for the necessary steps to conclude the transaction."

Murray's evidence was that, prior to this letter, he had told the respondents' representatives orally that he would be prepared to deal on the basis of the letter of 12th August but needed to make financial arrangements. He also said that at some time after despatch of the letter of 26th November a deposit of $5,000 was agreed as a suitable amount to be deposited pending completion.

On 13th January 1972 the respondents, by Mr. Bideshi, wrote to Murray and Partners saying:-

> "This is to acknowledge receipt of your letter dated 26th November, 1971, informing us of your willingness to pursue our offer of 12 acres of land at $9,000 per acre and the remaining 24 acres also at $9,000 per acre subject to eight per cent per annum pending cash settlement.
>
> We shall be happy to see you as early as possible to take the necessary steps to conclude the transaction."

That appears to have received no response at all and on 3rd March 1972 Mr. Bideshi wrote again saying:-

> "Reference is made to correspondence on the above subject ending with C.23/72 dated 13th January, 1972, suggesting that we make final arrangements to conclude the sale of 12 acres of land at $9,000 per acre and the remaining 24 acres also at $9,000 per acre subject to eight per cent per annum pending cash settlement.
>
> Would you please inform me by return mail whether you are still interested in proceeding with this sale."

The request for reply by return was not complied with and the matter seems to have gone to sleep for the next nine months, at any rate so far as the evidence goes. Murray's evidence, however, was that on 20th January 1973 a site meeting took place with a Mr. Maharaj of the respondents in the course of which, so he said, the approximate boundaries of the area of 36 acres were discussed and agreed, as was the phasing of the proposed development. On 18th April 1973 Murray wrote a further letter to Mr. Bideshi in which he enclosed a rough sketch of the area showing, *inter alia*, the position of a loading site belonging to the respondents and an access road which separated the northern and the southern parts of the site. In this letter he said:-

> "Further to our discussion on the above mentioned subject I enclose a sketch of the area to draw your attention to the loading site and the main access road.
>
> I suggest that Caroni Ltd. retain ownership of this road but that the purchasers of the 36-acre parcel be required to surface this road to the required specifications and to share equally the cost of maintenance of the road until it is taken over by Government; the purchasers, their heirs and assigns would be given the right to use this road without any restrictions.

> Regarding the Loading site, the purchasers should be given the first option to purchase at the same rate of $9,000.00 per acre when the site is no longer required by the Company for use as a loading area.
>
> My clients are anxious to finalise the purchase and would be grateful to hear from you as early as possible so that the agreed payment of $5000.00 could be made, and I could proceed with the survey."

It is quite clear that there was not, on any possible analysis, a contract between the parties at this stage but the letter produced a counter-offer in the form of a letter of 25th May 1973 in the following terms:-

> "We refer to your letter dated 18th April 1973 and to advise you that the access road will be sold outright to you with this Company retaining the right for the full use of this roadway without any restrictions.
>
> We agree that in due course when the decision is taken to dispose of the loading site you will be given first option to purchase at the same rate of $9,000.00 per acre.
>
> We look forward to your deposit and early finalisation of the above purchase."

Bernard J. expressed himself as "satisfied ... that ... as at the 25th May 1973 ... the transaction had passed the stage of negotiation and that as on that date there was a concluded contract". Their Lordships have been unable to accept this. In so far as it was intended to be a finding of fact it was contradicted not only by the terms of the letter but by the evidence of Murray himself who described the letter of 25th May as one "making a counter-proposal".

There the correspondence ends for relevant purposes. Murray in his evidence claims that he subsequently met a Mr. Maingot, the respondents' general manager, and indicated that he accepted the proposal in the letter of 25th May and subsequently arranged for delivery of a cheque for $5,000 by way of deposit. That was returned by the respondents who thereafter refused to proceed any further.

On 16th July 1974 the appellants commenced proceedings in the High Court of Trinidad and Tobago claiming specific performance of "an agreement made between the first named Plaintiff on behalf of himself and all the other Plaintiffs and the Defendant, and evidence by correspondence passing between the first named Plaintiff and the Defendant between the 7th day of July, 1971 and the 25th day of May 1973 for the sale by the Defendant to the Plaintiffs of 36 acres of

freehold land at Couva ... which said parcel of land is shown hatched on the sketch drawn by the first named Plaintiff and enclosed with his letter to the Defendant dated the 18th day of April, 1973 at or for the price of $9,000.00 per acre". By their statement of claim in its unamended form the appellants sought to rely upon the letters already referred to as evidencing a contract made partly orally and partly by the letters, but by an amendment made at the trial after the conclusion of the evidence they added a specific plea in the following terms:-

> "It was an express term of the said agreement that the Plaintiffs might complete the said agreement in three segments comprising 12 acres each with completion of the second segment being deferred for not more than 12 months after completion in respect of the first and completion in respect of the third segment being deferred for not more than 12 months after completion in respect of the second and that interest should be paid by the Plaintiffs during the period of such deferment on the balance of the purchase price for the time being at the rate of 8% per annum."

It was also pleaded, by paragraph 2 of the statement of claim in its amended form:-

> "It was an implied term of the said agreement that completion in respect of the first segment would take place within a reasonable time."

The defence denied that there was any contract, pleaded that there was in any event no sufficient memorandum of a contract to satisfy the provisions of section 4(1) of the Conveyancing and Law of Property Ordinance (which is in the same terms as section 40 of the United Kingdom Law of Property Act 1925) and pleaded further that the terms agreed (if any) were too uncertain to constitute a contract.

Bernard J. dismissed the appellants' claim, holding that the correspondence relied on, in identifying Murray as agent for some unnamed persons and omitting any mention of his interest in the alleged contract as a principal, failed properly to identify the capacity in which he was acting and accordingly did not constitute a sufficient note or memorandum of the contract. He further held that the memorandum relied on was, in any event, insufficient since it failed to include the material term regarding the deferred completion pleaded in the amended statement of claim. From this decision the appellants appealed to the Court of Appeal which, on 26th November 1986, upheld the decision of the trial judge on both grounds and dismissed the appeal.

In arguing the appeal before their Lordships' Board Mr. Harvie has, before attacking the grounds upon which the appellants case failed before the Court of

Appeal, addressed himself to the logically anterior question of whether there was a contract at all and if so what were its material terms. In doing so he has rightly not sought to support the contract pleaded in the amended statement of claim which accords neither with the terms of the correspondence nor with the evidence given at the trial by Murray. He has, however, submitted that the evidence of the correspondence did support a quite different contract, that is to say a contract for the immediate purchase by the appellants of the entire site of 36 acres at a price of $9,000 per acre to be paid as to $5,000 by way of deposit, as to $103,000 on completion and as to the balance of $216,000 as a single sum to be paid within a reasonable time with interest in the meantime at 8% per annum.

Such a contract, Mr. Harvie submits, can be deduced from the evidence of Murray taken in conjunction with the correspondence. Whatever else may be gleaned from the correspondence already quoted, it is quite impossible to find in it a memorandum of this agreement, but Mr. Harvie seeks to overcome this difficulty by the suggestion that the postponement of payment of the purchase price, being a provision solely for the benefit of the purchaser, was capable of waiver and therefore not a material term essential to be included in a memorandum sufficient to satisfy the Ordinance.

In their Lordships' view, however, Mr. Harvie's submission fails at an earlier stage, for the evidence simply does not demonstrate that the parties ever reached a stage at which there was any contractual consensus. Up to 26th November 1971 all that had happened was that Murray had made a proposal for a purchase of 12 acres at $7,000 an acre with options to purchase two further areas of 12 acres each at yearly intervals. That produced a somewhat cryptic counter-offer of 12 acres at $9,000 per acre and a further 24 acres at the same price "subject to eight per cent per annum pending cash settlement" - a phrase virtually meaningless without some further definition of how and when the additional 24 acres were to be conveyed and when the cash settlement was to take place. Murray's letter of 26th November 1971 did not accept this - even assuming that it constituted an offer capable of acceptance - but merely indicated a desire to "pursue it". Murray's evidence as to this went no further than saying:-

> "From the inception I had told Maingot that the development would be done in phases of 12 acres each and that I would like assistance from the Company to make payment on the land as we were ready to develop it. This seemed to have been accepted in their subsequent letters subject to 8% interest being charged on balance of the purchase price for the remaining area. I wanted three 12 acre developments. What I told them was in

> accordance with the letter of 7th July 1971. In the oral conversation they said this would be considered."

The next stage of any significance was the site meeting on 20th January 1973 at which Murray said that he agreed the approximate boundaries of the 36 acres. In particular he referred to a ravine at the northern boundary. Of this he said:-

> "We then discussed the question of straightening the ravine. I pointed out that it would be beneficial to straighten it out. He accepted it as being reasonable."

He also, he said, agreed to the three areas in which the three phases of the proposed development were to take place. "The boundaries we agreed to", he said, "were contained in a sketch which I sent under cover of a letter of 18th April 1973. It contained the boundaries I've described here. A surveyor would establish all the boundaries established by the sketch". Thereafter he wrote the letter of 18th April 1973 which contained two new propositions regarding the access road and the grant of an option to purchase the loading site. That met with a counter-offer which involved a purchase by the purchasers of the access road at an unnamed price.

Even accepting Murray's evidence of a subsequent meeting with Maingot at which this proposal was accepted, no evidence was tendered as to any agreement of the price at which or the terms upon which the road was to be transferred and their Lordships are quite unable to accept Mr. Harvie's submission that the matter of the access road can be treated as something collateral to and separate from the purchase of the 36 acres. This was a single negotiation in which their Lordships are unable to discern at any stage any final consensus between the parties on all the material terms of the bargain. The correspondence provides, indeed, as good an example as one can readily find of an inconclusive general negotiation, intended to be formally concluded when the land had been surveyed and the details came to be worked out between the parties' respective legal advisers, and which can be invested with a present contractual effect only by the implication into correspondence of wholly uncertain import of terms which in fact it is highly improbable that any business man would agree to without the most stringent safeguards and the clearest definition of the parties' obligations. If, as is now claimed, the land was to be transferred as one lot, how was the balance of purchase price to be secured? When was it to be paid? How was the interest to be paid and what was to be the vendor's remedy in case of default?

The view which their Lordships take renders it unnecessary to consider further the question of the sufficiency of any memorandum of the agreement. Even

assuming, however, as Bernard J. was prepared to, that the parties had arrived at a final agreement of the terms, both he and the Court of Appeal were, in their Lordships' view, clearly right in concluding that there was no sufficient memorandum of the agreement of which specific performance was sought on the pleadings. The appeal accordingly fails and must be dismissed with costs.